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U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

CASE NO. 95-ERA-15
DATE: APR 22 1997

In the Matter of:

STEVEN BOUDRIE,
COMPLAINANT,

v.

COMMONWEALTH EDISON COMPANY,

&

BECHTEL CONSTRUCTION COMPANY,
RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD¹

FINAL DECISION AND ORDER²

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 and Supp. V 1993), and is before the Board for review of the Recommended Decision and Order (R. D. and O.) issued by the Administrative Law Judge (ALJ) on December 11, 1995. 29 C.F.R. § 24.6 (1996). The ALJ recommended that the complaint against Respondent Commonwealth Edison (ComEd) be dismissed because Complainant Steven Boudrie (Boudrie) failed to establish a *prima facie* case

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that ComEd discriminated against him in violation of ERA's employee protection provision. R. D. and O. at 13. After reviewing the entire record, we affirm the ALJ's decision to dismiss the complaint against ComEd for the reasons set forth below.

However, we do not adopt the ALJ's analysis pertaining to Complainant's failure to establish a *prima facie* case of discrimination under the ERA's employee protection provision.

The ALJ also recommended that Respondent Bechtel Construction Company (Bechtel) be dismissed from this action under the terms of a settlement agreement by the parties. *Id.* See *supra* note 2.

BACKGROUND

The Complainant worked as a contract laborer for Bechtel from October 10, 1993, until he was laid off on April 8, 1994. Pursuant to its contract with ComEd during the "outage" phase of ComEd's Zion Nuclear Power Plant in Zion, Illinois, Bechtel supplied the necessary labor to perform the maintenance, repair and cleaning required at the plant during its scheduled downtime. As these activities were completed, the plant was reactivated and Bechtel routinely laid off its work crews. See testimony of Sonny Traver (Traver), Bechtel laborer foreman, Transcript (T.) at 475-76. Complainant was a laborer on the night shift of Bechtel's "As Low As Reasonably Achievable" or ALARA crew, and worked primarily as a "deconner" in a decontamination or "decor" pad in the Auxiliary (Aux) building, decontaminating tools. Boudrie, T. at 128-30.

On March 14, 1994, Boudrie was apparently permitted to leave the plant by a ComEd Radiation Protection Technician (RPT), carrying personal items of clothing that were contaminated with low level radiation particles. See testimony of Frank Rescek, ComEd radiation protection director, T. at 326-31, specifically concerning Boudrie's contaminated clothing; T. at 331-49, for general discussion of potential low level radiation hazard.

Boudrie had initially set off the radiation monitors at the guardhouse exit of the plant while wearing the contaminated clothing as he was leaving at the end of his work shift. After a couple of attempts to leave when the radiation monitors gave inconsistent readings, Boudrie returned to a controlled area of the plant and went through a decontamination shower, was outfitted with a paper suit to wear home and was told to wash the contaminated clothing a couple of times to rid them of the particles. He then exited the plant without setting off the monitors. Boudrie, T. at 133-38.

On March 15, Boudrie again set off the monitors when he was leaving, and a radiation particle was cut out of his sweatshirt. *Id.*, T. at 140-41. On March 16, Boudrie set off the monitors on entering the plant, which indicated that he had probably carried radiation contamination off site to his living quarters. *Id.*, T. at 144 47. At the end of the work shift, Mike Zeien, ComEd's contamination control coordinator, met with Boudrie because of the unusual circumstance of a worker bringing radiation contamination into the plant. Zeien, T. at 34.

Zeien requested, and Boudrie agreed, to let Zeien, accompanied by a ComEd RPT, Bechtel's ALARA coordinator and Boudrie's union steward, go to his living quarters to survey the premises to determine if there were any more contaminated articles. *Id.*, T. at 41-42, 46-47. The survey turned up some articles of clothing that had low levels of contamination. *Id.*, T. at 47. Boudrie took Polaroid pictures of the RPT and Zeien during the survey, and although the RPT did not object to his picture being taken, Zeien did. *Id.*, T. at 51-54; Boudrie, T. at 15152.

Zeien told Boudrie that he wanted the photo, since he had not given Boudrie permission to take his picture. Boudrie refused to relinquish the photo and then demanded that Zeien and the RPT leave his living quarters. *Id.*, T. at 152. Zeien and the RPT left after Boudrie agreed that the Bechtel representative and the union steward could stay behind and assume responsibility over the contaminated articles of clothing until a Nuclear Regulatory Commission (NRC) representative arrived to continue the contamination survey and take control of the contaminated clothing. *Id.*, T. at 153, Zeien. T. at 56. As he was leaving, Zeien apologized for his reaction about being photographed, as displaying "a partial attitude." *Id.*, T. at 56.

Zeien reported his suspicion to his supervisors back at the plant that Boudrie might be trying to "set up" ComEd for a possible legal action. Respondent's Exhibit 23 at page 0118. There were subsequent meetings between Boudrie and ComEd safety officials, but there were no further contamination incidents concerning Boudrie and no contact between Boudrie and Zeien for the next three weeks. Boudrie, T. at 212.

On April 5, 1994, Boudrie experienced two more contamination incidents. Zeien met with Boudrie on April 6, to discuss the contamination events. *Id.*, T. at 168. Zeien was disturbed by Boudrie's response to a question on a standard Personnel Contamination Event (PCE) form which asked how might the contamination have been prevented; Boudrie had responded "not to come to work." *Id.*, T. at 169-70. Zeien told Boudrie that he regarded that answer as inappropriate, especially since PCE forms were routinely reviewed by NRC staff. Zeien, T. at 77; Boudrie, T. at 170. Zeien also attempted to determine the causes of the two incidents. Boudrie commented that there were other laborers on the ALARA crew that were violating ComEd's safety standards, but declined Zeien's request that he identify them. *Id.*, T. at 170-71.

Zeien went to the decon pad the following day to observe the deconners. It should be noted that Zeien's job required him to field observe the activities at the plant since he was responsible for contamination containment, particularly if he had reason to believe that there were specific instances of violations of safety rules and procedures. Zeien, T. at 496-97. Zeien spoke to Boudrie at the decon pad site, and apparently one of the laborers who was actually disobeying ComEd's contamination containment rules became suspicious of Boudrie and later threatened him, believing that Boudrie had turned him in. Boudrie, T. at 180.

Boudrie felt that he was being harassed by Zeien and called the Bechtel field office trailer to get someone over to the decon pad while Zeien was there. *Id.*, T. at 177-78. When a Bechtel

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foreman responded to Boudrie's call, Zeien had already left the decon pad area. *Id.* Boudrie complained about being harassed to Traver, the Bechtel laborer foreman, during his coffee break later that morning, although Traver testified that Boudrie did not specifically identify Zeien as the individual harassing him. Traver, T. at 479.

There is a conflict in the testimony as to what happened next. Traver testified that Boudrie asked to be laid off the following day.³ Traver further testified that it was Bechtel's standard termination procedure to reassign laborers to non-radiation exposure areas prior to termination to minimize the employee's final full body radiation count. Therefore, Traver had Boudrie reassigned in the afternoon to an outside work area on the roof of the Aux building. Traver, T. at 479-82. Boudrie, on the other hand, testified that he did not ask to be laid off until after he had been reassigned to the outside job, where it was cold, and he was isolated from the rest of his work crew. Boudrie, T. at 181-82. Boudrie was laid off the following day, on April 8, 1994. In this case, Boudrie has alleged that Zeien unlawfully harassed him, that he was transferred to the outside job, and that he was constructively discharged all in retaliation for his protected whistleblower activities.

DISCUSSION

The Secretary has repeatedly articulated the legal framework within which parties litigate an environmental whistleblower case. Under the burdens of persuasion and production in whistleblower proceedings, the complainant first must present a *prima facie* case regarding the elements of an environmental whistleblower case. In order to establish those elements sufficient to present a *prima facie* case, the complainant must present evidence that, if not contradicted and overcome by other evidence, *see Brown v. Besco Steel Supply Co.*, Case No. 93-STA-30, Sec. Dec., Jan. 30, 1995, slip op. at 5, n. 2 (under the Surface Transportation Assistance Act), would show that: (1) the complainant engaged in protected conduct; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against the complainant. *Dean Darty v. Zack Company of Chicago*, Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 7-8. The complainant must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Id.*; *See also Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983); *Mosley v. Carolina Power & Light*, Case No. 94-ERA-23, ARB Final Dec. and Order, Aug. 23, 1996, slip op. at 4. Once a complainant presents such evidence a *prima facie* case has been established.

The respondent may challenge the complainant's *prima facie* case by producing evidence to rebut one or more of the elements of an environmental whistleblower case, or by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason.

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Complainant may prevail by proving the elements of an environmental whistleblower case and by proving that any legitimate reason proffered by the respondent is a pretext. In any event, the complainant bears the ultimate burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993); *Darty*, at 5-9 (citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)).

Once the employer presents evidence rebutting one or more of the elements of complainant's case, or produces evidence of a legitimate, nondiscriminatory reason for the adverse action, the answer to the question whether the complainant presented a *prima facie* case ceases to be relevant. Further, at this point in the proceedings the inquiry regarding whether a *prima facie* case has been made is not an economical use of adjudicative resources. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, Sec. Dec., February 15, 1995, slip op. at 11, n. 9, affirmed, 78 F.3d 78 (8th Cir. 1996). The Secretary stated that:

Logic dictates that once all of the evidence is in, whether a complainant presented a *prima facie* case is unnecessary to the ultimate outcome: If a complainant has not prevailed by a preponderance of the evidence on the ultimate question of liability it matters not at all whether [a *prima facie* case was presented.] On the other hand, if the complainant has prevailed on the ultimate question of liability, *a fortiori* [a *prima facie* case was presented.] In either case the question of real concern is whether the complainant proved by a preponderance of the evidence that [the employer retaliated against the complainant for engaging in protected activity.]

Id.

The ALJ erred in finding, after evaluating all the evidence, that Boudrie did not present a *prima facie* case. R. D. and O. at 8. However, as we discuss below, Boudrie did not prove that Zeien unlawfully harassed him in retaliation for his protected activities. And, the ALJ found, and we agree, that Boudrie did not present any evidence that his assignment to the roof job was caused by discriminatory animus on the part of ComEd. Therefore, Boudrie failed to prove that the transfer to the roof job was retaliatory. *Id.* at 11-12. It follows that Boudrie cannot have been constructively discharged. We therefore agree with the ALJ's ultimate conclusion that this complaint should be dismissed.

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Zeien's actions⁴

Boudrie did not prove that any ComEd employee, other than Zeien, engaged in any form of harassing or otherwise inappropriate behavior toward him.⁵ Boudrie's interaction with Zeien was unremarkable prior to the picture taking incident at his living quarters. Zeien's reaction to having his picture being taken without his permission was not unreasonable. He was suspicious of Boudrie's motives and asked for the picture to be given to him. When Boudrie refused, he did not respond with threats or physical action. Zeien merely turned toward Boudrie and held out his hand for the photo. When Boudrie told Zeien and the ComEd RPT to leave, they did so, after reaching an agreement with Boudrie that the Bechtel representative and Boudrie's union steward would remain at Boudrie's apartment until a responsible party from the NRC could be summoned to continue the radiation survey and take custody of the contaminated clothing.

Zeien and Boudrie did not have any personal contact for the next three weeks. At that time, Zeien, in the normal course of his employment, met with Boudrie to discuss Boudrie's latest contamination event. Zeien's reaction to Boudrie's written comment on the PCE form that he could have avoided the contamination event by "not coming to work," was to tell Boudrie "These are important forms. You don't screw around on them." Boudrie, T. at 170. We find this to be a natural and not excessive response to Boudrie's remark. Zeien's responsibility was to eliminate/minimize exposure to radiation contamination not only as his employer's contamination control coordinator, but also as the company's point of contact concerning radiation contamination with the resident NRC staff person.

Zeien's third and final contact with Boudrie came the following day, when Zeien followed up on Boudrie's allegation that there were other (unnamed) laborers violating the company's rules

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on personal decontamination procedures. Such follow up by Zeien was an integral part of his job, and was not harassment of Boudrie.

We therefore conclude that Zeien's contacts with Boudrie were not hostile and did not detrimentally affect Boudrie. As such, they cannot have been retaliatory.

Assignment to the Roof. Allegation of Constructive Discharge

Boudrie alleged that his assignment to the roof job was retaliatory. The ALJ rejected that claim for two reasons: Boudrie presented no evidence that his assignment to the roof was caused by discriminatory animus on the part of ComEd; and, because Boudrie did not present any evidence that the assignment was permanent rather than "brief and

temporary . . . after which the Complainant would return to the decon pad," there was no basis on which to conclude that the assignment was adverse employment action. R. D. and O. at 8, 11-12.

We agree with the ALJ's finding that Boudrie presented no evidence from which we could conclude that the assignment to the roof was motivated by animus on the part of the employer. That finding alone provides sufficient basis to conclude that Boudrie's assignment was not an unlawful retaliatory action. We could end our analysis of the assignment to the roof there. However, because the ALJ's conclusions regarding adverse action (R. D. and O. at 8) are subject to conflicting interpretation, we clarify our understanding of the law in this area.

An involuntary transfer to a demonstrably less desirable position is an adverse employment action because it affects the employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 5851(a)(1); see *Delaney v. Mass. Correctional Ind.*, Case No. 90-TSC-2, Sec. Dec., March 17, 1995, slip op. at 3 (under the Toxic Substance Control Act); *Nathaniel v. Westinghouse Hanford Co.*, Case No. 91-SWD-2, Sec. Dec., Feb. 7, 1995, slip op. at 7 (under the Solid Waste Disposal Act); and *Harrison v. Stone and Webster Engineering Group*, Case No. 93-ERA-44, Sec. Dec., Aug. 22, 1995, slip op. at 3. Moreover, the fact that an employee refuses to accept a retaliatory transfer, or acquiesces to the transfer for only a short period of time, and quits, does not render the retaliatory act of transferring the employee moot. Instead, the employee's refusal to accept the transfer is relevant to the remedy to which the employee may be entitled. *Id* If the employee is found to have been constructively discharged, reinstatement would be appropriate and post-resignation back pay would be allowed. *Id*. If the employee is found not to have been constructively discharged, such relief would be inappropriate. Thus, if Boudrie had proven that he had been discriminatorily transferred, the fact that he only worked on the roof for two hours would not have made a difference regarding ComEd's liability.

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However, the evidence presented by Boudrie regarding the circumstances of his assignment to the roof is wholly inadequate to show retaliation. The sum total of Boudrie's testimony regarding his assignment to the roof is as follows:

Q: Did you take any other action after you left the decon pad and went on break?

A: Yes, I went in to talk to Sonny Traver.

Q: What did you say to Mr. Traver?

A: I think he already knew. He talked to Gene [Smith, a foreman] because as soon as I walked into the office, I said, "Can I talk to you for a minute, Sonny?" He said, "Why is that A-hole [Zeien] bothering you again?"

Q: What did you say?

A: I said, "Yes. "

Q: What did you tell him?

A: I told him I was, I didn't want him [Zeien] harassing me no more.

Q: What did Mr. Traver say to you?

A: He offered me a layoff if I wanted it. He said, "If it's that much of a problem, I can get you out of here. Let me know by noon." This was on Thursday. He would have to do the paperwork. This would give him time to do the paperwork, and I could be laid off the next day.

Q: Was that essentially it with your meeting with Mr. Traver?

A: Yes

Q: What did you do after that meeting and break was over?

A: I went back down to the decon pad.

Q: Can you tell us what happened, if anything, after lunch regarding your work?

A: We were getting ready right after lunch to go back down to the decon pad, and

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Bob Johnson [the union steward] said, "Come here. You are being removed from your crew, and you won't be able to get into the aux building no more."

Q: What did that mean?

A: That I wouldn't have access to get into that area of the plant.

Q: What happened after that?

A: He took me over to Bob Traver [no relation to Sonny Traver]. He said, "You'll be working for Bob."

Q: Did you start working for Bob?

A: Yes.

Q: What kind of work did you do for Bob?

A: They took me up on a cherry picker, and put me on the, put me on the roof to pick up some pieces of plastics.

Q: What was it like working on the roof?

A: Not enjoyable at all. It was very cold.

Q: Can you compare the kind of work you were doing on the roof versus what you were doing on the decon pad?

A: The kind of work on the roof was isolated. You know, I was just stuck up there by myself. It was cold. I didn't have a coat. Normally, I worked for basically the whole outage inside. So, I didn't need a big winter coat. I didn't have my coat at that time. It was April, but it was right on Lake Michigan. It still gets rather cold.

Q: How long were you there approximately on the roof?

A: About two hours

T. at 179-80. It is impossible to conclude from Boudrie's vague, cryptic account of the circumstances relating to his assignment to the roof who assigned him there (clearly it could not have been Bob Johnson, the union steward), or for how long it was intended that he work there.

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Boudrie did not even allege that he objected to the assignment at the time it was made. These are the kind of rudimentary facts which are necessary to support Boudrie's allegation that the assignment was adverse. Boudrie had the burden of proof on this issue. He failed to meet that burden.

Finally, because we agree that the evidence did not establish that Boudrie's assignment to the roof was retaliatory, we conclude that as a matter of law and logic Boudrie's request for layoff could not have been a constructive discharge.

ORDER

The complaint of Steven Boudrie against Commonwealth Edison **IS DISMISSED.**

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member

[ENDNOTES]

¹On April 17, 1996, Secretary's Order 2-96 was signed delegating jurisdiction to issue final agency decisions under this statute and implementing regulations to the Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). The Order also contains a comprehensive list of the statutes, executive order and regulations under which the Board now issues final agency decisions.

²This Final Decision and Order pertains only to Complainant's case against Respondent Commonwealth Edison Company. Complainant's case against Respondent Bechtel Construction Company was settled between the parties and is addressed in a separate Order by the Board issued March 7, 1997.

³There is a minor disparity in Boudrie's and Traver's testimony as to the date that their discussion concerning Boudrie's request to go on layoff occurred. *Compare* Boudrie, T. at 17879 with Traver, T. at 478. We do not consider Traver's apparent mistake as to the dates material to our decision.

⁴Boudrie urges the Board to broadly construe discriminatory conduct of employers within the context of the environmental whistleblower statutes to include any hostile act by employers against employees. Thus, employees would be entitled to compensation for

any discriminatory hostility exhibited by their employer regardless of whether they suffered any tangible job detriment (*i.e.*, a negative affect upon compensation, terms, conditions, or privileges of employment), or whether the retaliatory acts were sufficiently pervasive to constitute hostile work environments. Complainant's Rebuttal Brief at 2-5. We need not reach this issue here, because Boudrie failed to prove that any of the alleged hostile acts by Zeien were either adverse or retaliatory.

⁵The allegation that Boudrie was threatened by a coworker who believed that Boudrie had turned him in for not following decontamination procedures cannot be considered as part of Boudrie's hostile work environment claim. Boudrie did not allege that he told any ComEd staff about the threat at the time and therefore he cannot now allege that they acted inappropriately in responding to that threat. T. at 217-22.